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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

v.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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The Appellee, in accordance with Rule 16(1) of the Rules of this Court, moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the appeal does not present a substantial federal question.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

This appeal is taken pursuant to 28 U.S.C. §1257 (2) which provides: "Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows: By appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The statute which is alleged to be unconstitutional in these proceedings is the Maryland Motion Picture Censorship Act which is codified in Article 66A of the Maryland Code (the statute is set forth in its entirety in Appendix J of Appellant's Jurisdictional Statement).

B.

The Proceedings Below

The Maryland State Board of Censors refused to license the motion picture film, "I Am Curious (Yellow)" upon a finding that it was obscene, applying the standards set forth by this Court, as adopted by the Court of Appeals of Maryland. In accordance with Article 66A, §19, the Board promptly filed suit in order to have a judicial determination of this issue. The case came on for hearing within the time limitations set forth in the statute, with the Board having the burden of proof on the obscenity issue in accordance with the statute. The trial court viewed the film, heard testimony of numerous witnesses over a two-week period, and viewed the film again before reaching a decision. The Court filed an order, within the two-day period allotted by statute, disapproving the film for licensing upon a finding that the film "is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly

without redeeming social value. An appeal was promptly entered from this judgment and order.

In accordance with the statute the case was advanced for argument in the Court of Appeals of Maryland. The Court of Appeals in a four to three decision affirmed. The majority, in an opinion by Judge Finan, found that the movie was obscene under the tridentated test set forth by several justices of this Court in "*A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General*", 383 U.S. 413. This test, although only subscribed to by three justices of this Court, has generally been referred to as the holding of the Court in that case, and it is the test which the Maryland Courts have adopted. Judge Barnes concurred in the finding that all three tests had been satisfied, but he went further. He found evidence of pandering as envisaged by this Court in *Ginzburg v. United States*, 383 U.S. 463. He also found that the third test, i.e., that the material is "utterly without redeeming social value" is not to be applied to motion pictures but rather that the *Roth* standard, namely, "whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," without its judicial amendments, is the rule governing motion pictures. The opinion of the three dissenting judges is summed up: "Because I think the film is not 'utterly without redeeming social value,' I would (reluctantly and with regret) reverse the court below."

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. *The Maryland Statute is Constitutional*

Appellant has attacked the constitutionality of Maryland's censorship law in order to invoke this Court's appel-

late jurisdiction. They contend that the Maryland censorship statute is unconstitutional because it: (1) does not comply with the limitations prescribed by this Court for a licensing statute in *Freedman v. Maryland*, 380 U.S. 51 (1965), and *Teitel Film Corporation v. Cusack*, 390 U.S. 139 (1968); (2) provides an unconstitutional standard for judging obscenity; (3) prevents the circulation of non-obscene films.

This is not the first time this Court has been asked to consider the Maryland statute. In *Freedman v. Maryland*, *supra*, (decided March 1, 1965) the Court found the statute to be unconstitutional as a violation of the First Amendment to the Constitution because:

> "1) If the Board disapproved the film, the exhibitor was required to assume the burden of instituting judicial proceedings and of persuading the court that the film was constitutionally protected expression; 2) after the Board had declined to license the film, its exhibition was prohibited pending judicial review, however long such judicial review might take; and, 3) the Maryland statute provided no assurance of prompt judicial determination."

By Chapter 598 of the Acts of 1965, enacted as an emergency measure, effective April 8, 1965, the General Assembly of Maryland repealed and reenacted Section 19 of Article 66A, with the obvious intention of fully meeting the three objections set forth in the *Freedman* opinion. The new Section 19 provides that any film duly submitted to the Board for examination and licensing "shall be reviewed and approved within five (5) days, unless the Board shall disapprove" the film under the provisions of Section 6. In the event of disapproval, the Board is required "within not later than three (3) days thereafter, to apply to the Circuit Court for Baltimore City for a judicial deter-

mination as to whether such film is obscene . . ." It is also required that "notice of such application shall be forthwith sent by first class mail, postage prepaid, to the address of the person presenting such film for licensing." The Circuit Court is required within five days after the filing of the application to conduct a hearing, view the film, and within two days after the hearing, "enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said Section 6 hereof." It is further provided that if the order disapproves the film, then the person presenting the film for licensing may appeal such determination to the Court of Appeals in accordance with the Maryland Rules of Procedure, and the Court of Appeals "shall advance such case upon its hearing calendar to the earliest practicable date" and in its review, the Court of Appeals "shall view the subject film." Then is added, "The burden of proving that the film should not be approved and licensed shall rest on the Board."

In *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A. 2d 235 (1965) the Court of Appeals of Maryland held that the amendment fully satisfied the constitutional requirements of *Freedman*.

Appellant's argument is that the amendment does not set a time limit within which the Court of Appeals must act and that the statute is therefore unconstitutional as not meeting the *Freedman* requirement of assuring a "prompt final" judicial decision. Appellant argues that the terminology "final judicial decision" means the decision of an appellate tribunal. This is clearly not the meaning of the Court in *Freedman*. Final judicial decision in this context means a final determination by a trial court on the merits, reviewing an administrative refusal to license.

The word "final" in this context is used to distinguish an adjudication on the merits after an adversary proceeding from a preliminary injunction. The Court made this clear in *Teitel Film Corp. v. Cusack, supra*, in holding that the Chicago censorship ordinance was violative of the *Freedman* standard because: The absence of any provision for a prompt judicial decision by the trial court violates the standard that ". . . the procedure must also assure a prompt final judicial decision." Statutory assurance of prompt judicial decision by the trial court in reviewing the action of the administrative censor is the requirement imposed by *Freedman* and applied in *Teitel Film*. Appellant here does not contest the statute at issue on these grounds, but rather he would create an additional requirement imposing time limitations on appellate action. Even though no such requirement has been enunciated by this Court, the Maryland statute goes a long way towards implementing such a procedure. It provides that censorship appeals shall be advanced on the calendar of the Court. In the instant case the appeal was advanced on the appellate calendar, and came on for hearing in the shortest possible time compatible with the preparation of the record and briefs. The lengthy opinions of the majority, concurrence, and dissent account for the complained of delay in the issuance of the Court's opinion.

A short review of the history of this case should be made to counter any allusions Appellant makes as to State caused delay. The Censors' determination, the filing of suit and the start of the trial were all within statutory time limits. The trial lasted two weeks — largely on account of lenthy cross examination by Appellant of Appellee's witnesses and because of the numerous witnesses produced by Appellant. The trial Court's opinion was filed within two days from the conclusion of the trial on July 31, 1968, in accord-

ance with the statute. The lengthy record was not completely transcribed until early in August. Briefs were then submitted prior to appellate argument on September 8th (the first day of the September Term of the Court of Appeals after the summer recess). The case was advanced on the calendar of the Court to be heard on that day. There was no request by Appellant for an immediate decision of the Court as had been rendered in some prior obscenity cases. The Court's lengthy decision was filed on October 22, 1969.

Appellant's second objection to the statute is that the definitional standard for obscenity set forth in Section 6 is so broad as to be unconstitutional. The short answer to this is that the Maryland Court of Appeals has already held in *Sanza v. Maryland Board of Censors*, 245 Md. 319, that the Section 6 definition of obscenity is unconstitutional. The statute does contain a severability clause and the Court in holding the definition of obscenity of Section 6 to be unconstitutional, held that the only standard of Section 6 which remains is that the Board shall disapprove such films "as are obscene". The Court recognized that the only proper standard for disapproval of a film was obscenity in a constitutional sense under the rules laid down by this Court. The only remaining standard of Section 6 after the Court of Appeals' decision in *Sanza* is the portion of Section 6 which states that the Board shall disapprove such films "as are obscene". This Court in *Roth* and *Alberts* upheld federal and state statutes stated in such broad definitional terms. The statute as it now stands recognizes only obscenity as defined by this Court as grounds for the refusal to issue a license; the Board of Censors applies only the Court's criteria in making its judgments; the proof at trial in review of their administrative determination is presented in accordance with these criteria; the trial court

applies these criteria, and the Court of Appeals of Maryland recognizes this Court's definition of obscenity as the only controlling criteria.

Appellant's third objection to the statute amounts to a general objection to prior censorship. This Court has precluded such an argument in *Times Film Corporation v. Chicago*, 365 U.S. 463, and *Freedman v. Maryland*, *supra*. Under the Maryland system of prior censorship only obscene pictures are refused a license, and this procedure is subject to the required judicial review. Films which are found to be non-obscene are granted a license with minimal delay.

It appears to be a fair conclusion that Appellant's attack on the constitutionality of the statute is only a device to meet the jurisdictional prerequisite of 28 U.S.C. §1257 (2) for review on appeal. His three contentions in this respect are patently specious when considered in the light of this Court's prior decisions. The first contention is precluded by *Freedman* and *Teitel Film*. The second contention is premised on an inaccurate factual basis, and the third contention has already been adjudicated against him in *Freedman* and *Times Film*.

B.

The Film is Constitutionally Obscene and Summary Reversal Pursuant to Redrup Would Be Improper.

Having reached this Court on appeal pursuant to a specious argument regarding statutory invalidity, Appellant now asks this Court to summarily reverse the judgment below on the obscenity issue. They state that the film is "plainly not obscene" and that therefore under the rationale set forth by this Court in *Redrup v. New York*, 386 U.S. 767 (1967), the Court should reach the obscenity issue and dispose of it in their favor.

Appellant's bland assertion that the film is plainly not obscene is easily refuted. The film was found to be obscene by a jury in the United States District Court for the Southern District of New York. It was found to be obscene in a very well reasoned opinion by Judge G. Joseph Tauro, Chief Justice of the Superior Court in Boston. It was found to be obscene by Judge Herbert W. Walton in a State Court proceeding in Johnson County, Kansas; by Judge John H. Lucas in a State Court proceeding in Kansas City, Missouri; and by Judge John J. Lally in a State Court proceeding in Spokane, Washington. It was found to be obscene by a three judge federal court in the United States District Court for the District of Kansas. It was found to be obscene by a Maryland trial court and the Court of Appeals of Maryland. The foregoing list is merely illustrative of the findings of obscenity as to this movie and it is not exhaustive.

These judicial findings of obscenity are supported by well reasoned opinions, and we incorporate these by reference into this Motion. We also restate the arguments set forth in the Appellee's Brief (pages 15-33) in the Maryland Court of Appeals, as to this issue.

It must be noted that each of the judicial findings of obscenity was made by applying the three tests enunciated by Justice Brennan in the *Memoirs* case. This is the most liberal of the varying tests for obscenity which some members of the Court have enunciated, and as will be further stated in the next argument, it is not at all clear that it is the proper test to be applied, particularly to motion pictures.

Redrup v. New York, supra, is not authority for summary reversal even if the Court were to view the film, review the testimony, and come to the conclusion that it was not ob-

scene in the constitutional sense. *Redrup* involved three separate appeals from convictions for sale of allegedly obscene materials, which were consolidated. The Court originally limited review in these cases to certain particularized questions upon the hypothesis that the material involved in each case was of a character described as "obscene in the constitutional sense" in *Memoirs*. Finding that hypothesis, i.e., that the material was "obscene" within the meaning of Memoirs — invalid, this Court reversed without considering the other issues. The Court noted in a *Per Curiam* Opinion that the material was not obscene under *any* of the various theories of obscenity propounded by the different justices in *Memoirs*. The Court indicated that it was able to reach the obscenity issue and dispose of the case on that basis because there were no special circumstances which would warrant the application of any other criteria. The Court indicated that it would not have been able to dispose of the cases in such a summary manner if: (1) the statute in question reflected a specific and limited state concern for juveniles; (2) the case involved a suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it; (3) there was evidence of pandering. If any of these elements are present additional issues other than obscenity *vel non* must be considered and summary reversal on the basis of *Redrup* is not appropriate.

The pandering exception is the one which would prohibit summary reversal in the case at issue. The Court in *Ginzburg v. United States*, 383 U.S. 463, held that proof of pandering vitiates any claim of socially redeeming value. Therefore when pandering is an issue, material which is otherwise not obscene can be branded obscene because the purveyor has chosen to market the material as being

salacious. In the case at issue, evidence of pandering was adduced at the trial court, but inasmuch as there was a finding of constitutional obscenity the Court did not have to reach the pandering question. Pandering was argued on appeal, (Appellee's Brief, pp. 33-35) but for the same reason the majority did not reach the issue. Judge Barnes concurring did reach the pandering issue and found Appellant's culpable on that grounds. This Court can not properly reverse summarily on the basis of *Redrup*, no matter what its findings are on the obscenity issue, with the pandering issue still to be resolved.

Redrup has not changed the test for obscenity as some courts and commentators have felt — *Roth* and *Memoirs* are still the controlling standard as reaffirmed by this Court in *Stanley v. Georgia*, 394 U.S. 557.

Redrup, while not providing grounds for summary reversal in this case, would justify the granting of this motion. The Court could, on the record before it, and upon a view of the film arrive at the conclusion that the film is constitutionally obscene. Such a decision would obviate any necessity to consider the pandering issue. *Redrup* has not been so used by this Court to affirm a lower Court's finding of obscenity, but the rationale is certainly applicable. If the material is clearly obscene, as here, and there are no substantial federal questions raised, as here, summary affirmance is in order.

C.

The "Socially Redeeming Value Test" Is Not A Proper Independent Test for Obscenity.

A majority of this Court agreed on a test for obscenity in *Roth v. United States*, 354 U.S. 476. This test was "whether to the average person, applying contemporary

community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court held that obscenity was not protected by the First Amendment because it is "utterly without redeeming social importance." Justice Brennan joined by Chief Justice Warren and Justice Fortas in *Memoirs, supra*, expanded the *Roth* test by adding a requirement that the material must be "utterly without socially redeeming value" before it can be considered obscene. This added test evolved from the language in *Roth*, but *Roth* does not warrant such an interpretation, as pointed out by Justice White and Justice Clark in their separate dissent. The dissenting Justices point out that "social value" is not an independent test and that it is erroneous to equate a modicum of social value with the *Roth* standard of social importance. Certainly any work with minimal social value does not have social importance.

Appellee submits that "social value", is not the correct standard but rather that "social importance" should be the measure. Appellee further submits that the issue whether there is "social importance" is not an independent test of obscenity but is relevant only in determining the predominant prurient interest of the material. The minority opinion of Justice Brennan in *Memoirs* has somehow been generally accepted as setting forth the controlling rule of obscenity both as to books and movies. This is the wrong test to judge the obscenity of any material.

D.

Different Standards of Obscenity Should Be Applied to Motion Pictures.

Even if we are to accept the misconstruction of *Memoirs* with its independent "utterly without socially redeeming value" test, it does not follow that this test should be

applied to motion pictures. The test was enunciated in a case involving books, and if it is at all applicable, it is only applicable to books. Therefore if the Court were to apply the three pronged test of *Memoirs* and arrive at the conclusion that the film is not constitutionally obscene under these standards, it should take into consideration whether these standards, specifically "the utterly without socially redeeming value test," are properly applicable to motion pictures.

This Court and numerous other courts have noted a difference between movies and novels in the obscenity context.

As early as 1952 when this Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("the Miracle") in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, JJ., concurring; there were no dissents) observed the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present it own peculiar problems." (343 U.S. at 502-503, 72 S. Ct. at 781, 96 L. Ed. at 1106).

Mr. Justice Clark in his concurring opinion in *Kingsley Pictures Corp. v. Regents* ("Lady Chatterley's Lover"), 360 U.S. 684 (1959) stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness.'" (Emphasis in original).

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman v. Maryland, supra:*

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Judge Hays, in the Second Circuit case involving the film in this case in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books." (404 F. 2d at 198).

In the State Courts the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau v. Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966) the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland, supra*). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal. L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-

darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J. supra, at p. 708).

"Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." Id. at 181.

The obscenity finding in this case was affirmed by the Supreme Court in 388 U.S. 450.

See also the interesting discussion of this matter by the Court of Appeals of New York in *Trans-Lux Dist. Corp. v. Board of Regents*, 14 N.Y. 2d 88, 248 N.Y.S. 2d 857 (1964), rev'd per curiam, 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) citing only *Freedman v. Maryland*, *supra*, from which it can be inferred that the reversal by the Supreme Court was on the basis of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity.

It is also most interesting to note the position the present Appellant, Grove Press, took in the *Memoirs* case. That position as set forth in their brief was that the "social value" tests should be limited to books. This argument was explained in a recent book by Charles Rembar, counsel who represented Grove Press in *Memoirs*. The book entitled "The End of Obscenity," was published in 1968 by Random House. Mr. Rembar, on pp. 436 through 441 presents a strong argument for limiting the "social value" test to books — an argument which conceivably induced certain members of this Court to adopt the test. This argument of counsel for Grove Press is of real interest in this case involving a movie, and should be brought to the Court's

attention in its entirety. Quoting from pages 436 to 441 of the book:

"The final problem in writing the brief (save one that I will discuss in a later chapter because my decision was not to deal with it in the brief at all) was not raised either by the court below or by our opponents. It had to do with whether the value test could operate in all situations and for all forms of expression. Up to this point I had never spoken of possible exceptions, nor did the language of *Roth* on which we relied suggest any. Though the problem had been on my mind, it was not something that I had thought it necessary, or desirable, to discuss. But now, I felt, it had to be dealt with, to some extent at least: the Supreme Court might be undertaking a fundamental review of the law, and nine agile intellects would be ranging over the field of obscenity.

The value test had a valid conceptual basis in the First Amendment and a valid precedential basis in *Roth*, and it worked well — made practical sense — in the cases where we had sought to apply it. Yet one could conceive of situations where, though the test by its terms might seem to invoke the guaranty, the Court would certainly approve suppression. Let us assume a play in which an act of sex is performed (performed, not suggested). Let us also assume the play has dramatic merit. To make the point plain, let us finally assume it is broadcast on network television. (The reader may make his own choice of the particular variety of sexual act, and of whether the broadcast would be in black-and-white or living color.)

I did not want to undertake a specific discussion of hypotheticals such as this. My opponents in the various cases had not brought them up. They did not argue that the value theory should be rejected because in some areas it was unworkable. Rather, they urged that *Memoirs* itself failed the value test (as the attorney general contended), or that there was no such thing as a value test (as the Citizens for Decent Lit-

erature were to contend). It would hardly be wise to spell out an argument against our position that our opponents were not making. Nevertheless, either during the hearing or in the Justices' private thinking, horror examples might come into their deliberations. I wanted to suggest a solution without posing the problem.

There were two things in the brief that I hoped would serve the purpose. One was the distinction between expression and conduct. The imaginary television show I described involves performance and public audiences. It may be true that the performers have something to communicate, and that to this extent expression would be silenced, but the situation may fairly be regarded as in its essence action. The Court had sanctioned the impairment of communication where elements of action were present; it had, for example, approved restrictions on parades, and on the use of 'loud and raucous' sound trucks, and on salesmen calling without invitation. A defendant charged with indecent exposure — in the streets, not on the stage — might also argue that his effort is to communicate, and no doubt it is.

Having drawn on the distinction between expression and conduct, I then suggested that another kind of distinction might be appropriate — among different forms of expression. Again, I did not offer it as a reply to something said on the other side, but rather as an affirmative part of our own argument, an additional reason for giving new freedom to writers. The final paragraphs of the brief were these:

> 'It has, of course, been held that the guaranties of freedom of speech and of the press go beyond vocal utterance and the printed word. It does not follow, however, that the guaranties are to be applied in the same way, or to the same extent, with respect to all forms of expression. Books have a certain primacy because of their importance to society. Moreover, such conflicts as there may be with interests sought to be served by anti-

obscenity legislation are less intense where books are concerned.

The audience for a book is the individual reader, not an assembled group. In a theater audience, for example, there is a simultaneous collective experience, and the social interaction itself creates problems. (The familiar hypothetical from another area of restraint — shouting "Fire!" in a theater — would hardly present a problem if there were only one other person in the theater.) Again, the reader of a book has instant control over his exposure to it; he can terminate the experience by closing the book, and if its reputation puts him off, he need not open it. In contrast, other means of communication — the sound truck, for example, or the advertising poster in a train or bus — make us their captive. Television, the great new medium of our time, presents both aspects: its communications are usually received in a social situation, and contact is not always easily broken off. (Typically, television-viewing is a family affair, and it takes a family consensus to end it.) Finally, forms of expression differ in their impact. Scenes described in commonly accepted books would, if performed by actors on a stage, or displayed in photographs on a billboard, become quite different in their effect. Unlike forms of expression that make direct appeal to the senses, a book's communications must pass through the screen of the intellect.

There is no important channel of communication that is more private and more a matter of individual control than a book. There is none that is less inflammatory (except in the unassailable realm of ideas) or less involved with public decorum. Hence the possibilities of antagonism between the publishing of books and other interests of society are relatively small.

At the same time, books have a singular importance for society. Tradition gives them a special place. It was to liberty of printing that John

Milton's *Areopagitica* was addressed, and the great controversies about freedom of expression that were resolved in the adoption of the First Amendment had to do mainly with books (including that predecessor of contemporary paperbacks, the pamphlet).

Books provide a vehicle for the transmission of thought that is not matched by other forms of expression. They communicate ideas not only by way of exposition, but also through the shared experiences and perceptions of poetry and fiction. Other forms of expression may be as good or better for entertainment, excitement or provoking emotional response, but the printed word remains the most important medium for the communication between mind and mind on which our civilization rests.

Any exercise of governmental power that hampers the free circulation of books therefore threatens our society. Even where printed matter upon trial is shown to be utter trash, and may properly be called a book only because there are pages and ink and a cover, the use of the law to suppress it raises grave questions. The decisions of the Court leave room for the suppression of such material. But they leave no room whatever for the suppression of a book which, upon trial, is shown to have value — "literary or scientific or artistic." The contrary proposition, we submit, toys in a frightening way with the fundamentals of our government. If the concept of freedom of the press is not to be qualified beyond recognition, it must mean that in a case where value is proven, a book may not be destroyed. That is the case before the Court.'

If the television example and other *casus horribiles* should occur to Justices, these paragraphs would serve as a reminder that they involve modes of communication other than books. If one of the insupportable

hypotheticals should someday become real, the Court could distinguish its *Fanny Hill* decision (assuming it was a decision in our favor) on the ground that the uncompromising social-value test had gained acceptance in a case that involved a book.

There was no precedent for separating media of expression but neither was there precedent that stood in the way. The Court had declared motion pictures protected by the First Amendment, but whatever statements had been made by individual Justices, the Court had not ruled — there had been no case presenting the question — that motion pictures are entitled to protection in the same way or to the same extent as books. Nor does it follow. It would not follow even from Black's absolute view of the First Amendment. Black's premise is that the Amendment is to be taken literally. The Amendment states, the reader will recall, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .' Black's appealing argument is that 'no law abridging' means 'no law abridging.' The majority's answer to Black, that the First Amendment had never been construed to confer an unlimited freedom, had behind it massive authority and little logic; it represented a conclusion, not a reason.

But there is another answer where the books are not involved, one that Black might accept. If the Amendment is to be given a literal reading, then it may be said that films, and other art forms that are not entirely verbal, are not literally speech or the press. On the other hand, once 'speech' and 'the press' are expanded beyond their plain meanings, we are not reading the amendment literally; if that is the way the game of interpretation is to be played, then a converse liberty may justly be taken with the word 'abridging.' The Amendment's prohibition against lawmaking need not be imposed strictly where what the law affects is not strictly speech or the press.

The extreme situations could thus be accounted for, whether the First Amendment is to be given a literal construction or the traditional loose construction. Two

members of the Court subscribed to the literal construction, and of the others, there were three or four who I hoped would accept the value test; the two groups taken together would make a majority. It was that majority for whom, if they should be troubled by cases not present but envisioned, it was necessary to provide solutions.

I was of course not interested in suggesting candidates for censorship. But I was speaking to a Court which, as I saw it, had not the slightest idea of granting complete freedom for everything that might be called expression. I was saying that situations for which it might think anti-obscenity laws altogether fitting were different from ours; the precedent the Justices would set by ruling in our favor, need not in future cases haunt them. Remote regions of constitutional law did not have to be mapped in detail. It was enough to point out that distinctions among modes of communication were permissible, that the Court's opinion need not state a single rule for all of them, and that the printed word was entitled to the greatest freedom. What the attorney general had proceeded against was the printed word."

The difference between films and books having been recognized by the Court, and by Appellant, Grove Press, in a prior case before this Court, what sense does it make merely to pay lip service to it? If this Court says movies are different and different standards should apply to them, then different standards should be formulated and applied. The only contray indication to this reasoning is *Jacobellis v. Ohio*, 378 U.S. 184, where this Court applied standards governing books to a movie, but Appellee submits that the display of sex in that movie was so innocuous by present day standards that it would have been found not to be obscene under any standard and that the application of the criteria governing books to a movie in that case does not determine the issue

If not the threefold test of *Memoirs*, what test should be adopted to effectuate this Court's recognition of a difference between books and movies? Two viable alternatives have been mentioned. One suggestion is that the *Roth* test without the "social value" criteria added by later cases should be the standard. This alternative is recognized by Grove Press counsel in the quoted material as having merit, it has been expressly held to be the law by the Kentucky appellate court in *Cain v. Kentucky*, 437 S.W. 2d 769; Judge Tauro in the Boston case involving this movie heretofore referred to, so held; and Judge Barnes in his concurrence in the case at issue made such a finding. The other alternative of equating obscene films with proscribed conduct rather than protected speech is also recognized by Grove as having merit in the incorporated quote. This test was well stated by the Court of Appeals of New York in *Trans-Lux Dist. Corp. v. Board of Regents, supra.*

Appellee submits that if there is anything worthy of review in this case, in a plenary manner, as opposed to summary affirmance, it is the reevaluation of a definition, to be concurred in by at least a majority of this Court, first as to books and second as to films. This Court has not adopted by a majority of its members the three pronged test of obscenity enunciated by Justice Brennan in *Memoirs* as to books let alone as to films. The lower Courts are left in a quandry as to the controlling test, and in this judicially created vacuum they have opted to the ultra liberal "social value test," probably because this formulation was printed first in the formal rendering of the Court's opinion. If the holding in *Roth* that obscenity is to be excluded from constitutional protection is to be given practical effect, the independent "social value" test must be discarded.

Certainly even if this Court were to adopt the three pronged test as to books, the test as to films would be more liberal.

E.

Appellants' Other Contentions Are Insubstantial.

Appellant contends that the fact that the Maryland Court's finding as to obscenity is in conflict with the finding of the Second Circuit raises a substantial federal question. Rule 19 of the Supreme Court Rules setting forth consideration governing review on certiorari provides that where there is a conflict between the decisions of two Circuit Courts of Appeal this will be given consideration in deciding whether to grant the writ. There is no indication in the applicable statutes on rules that the mere fact that a State Court decision conflicts with a Federal Circuit Court decision raises a substantial federal question. Appellants cite no authority for their proposition that such a conflict does raise a substantial federal question. Absent such authority, their proposition must fall.

Appellant also attacks the constitutionality of multiple State and local obscenity proceedings against material which has survived a contested customs case in the lower federal courts. No substantial federal question is presented by such a contention. For Appellant to prevail he would have to forge a new Constitutional provision into our federal system to the effect that the States are bound by the decisions of lower federal courts. The multiplicity of State actions is inherent in our federal system — only the Supreme Court can bind the States by a judicial interpretation of non-obscenity. This Court, in *Freedman v. Maryland, supra*, definitively held that a State may validly exercise a censorship system subject to procedural safeguards. Appellant's argument in this respect is directly contrary to settled Constitutional law.

Appellant also attempts to convince the Court that the application of the Court's finding in *Stanley v. Georgia, supra*, to the facts at issue raises a substantial federal question. The Court's holding in *Stanley* clearly does not apply here. The Court's holding was, "We hold that the First and Fourteenth Amendments probihit making mere private possession of obscene materials a crime. *Roth* and the cases following that decision are not impaired by today's holding." The Court also noted that "*Roth* and the cases following it discerned such an 'important interest' in the regulation of commerical distribution of obscene materials." "I Am Curious (Yellow)" is surely commercially distributed if it has been shown in "50 cities, 25 states and the District of Columbia," and just as surely *Stanley v. Georgia* is inapplicable.

Appellant raises several more obtuse questions under the hearing "suppression of favorable leads." Appellee adopts the findings of the Maryland Court of Appeals as to these contentions. These findings establish the insubstantiality of the contentions.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals of Maryland.

Respectfully submitted,

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